

HOUSE No. 821

By Mr. Linsky of Natick, petition of David Paul Linsky and others relative to the issuance of subpoenas for records of providers of electronic communication services. The Judiciary.

The Commonwealth of Massachusetts

PETITION OF:

David Paul Linsky	Karen E. Spilka
Michael E. Festa	Brian Paul Golden
Cory Atkins	

In the Year Two Thousand and Five.

AN ACT TO MODERNIZE THE ADMINISTRATIVE SUBPOENA STATUTE.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Chapter 271 of the General Laws is hereby
2 amended by striking out section 17B, as appearing in the 2000
3 Official Edition, and inserting in place thereof following section:–
4 Section 17B. Except as otherwise prohibited under section
5 2703 of Title 18 of the United States Code, whenever the attorney
6 general or a district attorney has reasonable grounds to believe
7 that records in the possession of (i) a common carrier subject to
8 the jurisdiction of the department of telecommunications and
9 energy, as defined in paragraph (d) of section 12 of chapter 159;
10 or (ii) a provider of electronic communication service as defined
11 in subparagraph (15) of section 2510 of Title 18 of the United
12 States Code; or (iii) a provider of remote computing service as
13 defined in section 2711 of Title 18 of the United States Code, are
14 relevant and material to an ongoing criminal investigation, the
15 attorney general or district attorney may issue an administrative
16 subpoena demanding all such records in the possession of such
17 common carrier or service, and such records forthwith shall be
18 delivered to the attorney general or district attorney. No such
19 common carrier or service, or employee thereof shall be civilly or

20 criminally responsible for furnishing any records or information in
21 compliance with such demand. Nothing in this section shall limit
22 the right of the attorney general or a district attorney otherwise to
23 obtain records from such a common carrier or service pursuant to
24 a search warrant issued pursuant to sections 1 to 3, inclusive, a
25 court order or a grand jury or trial subpoena.

26 Notwithstanding the provisions of this section, a subpoena
27 issued pursuant to this section shall not be used to obtain records
28 disclosing the content of electronic communications, or subscriber
29 account records disclosing Internet locations which have been
30 accessed including, but not limited to, websites, chat channels and
31 newsgroups, but excluding servers used to initially access the
32 Internet.

1 SECTION 2. Chapter 276 of the General Laws is hereby
2 amended by inserting after section 1A, as so appearing, the
3 following section:—

4 SECTION 1B. (a) As used in this section, the following terms
5 shall have the following meanings:

6 “Adverse result,” occurs when notification of the existence of a
7 search warrant results in:

8 danger to the life or physical safety of an individual;

9 a flight from prosecution;

10 the destruction of or tampering with evidence;

11 the intimidation of a potential witness or witnesses; or

12 serious jeopardy to an investigation or undue delay of a trial.

13 “Electronic communication services”, shall be construed in
14 accordance with Title 18, sections 2701 to 2711 of the United
15 States Code. This definition shall not apply to corporations that do
16 not provide those services to the general public.

17 “Foreign corporation”, any corporation or other entity that
18 makes a contract or engages in a terms of service agreement with
19 a resident of the commonwealth to be performed in whole or in
20 part by either party in the commonwealth. The making of the con-
21 tract or terms of service agreement is considered to be the agree-
22 ment of the foreign corporation that a search warrant or subpoena
23 properly served on it has the same legal force and effect as if
23 served personally within the commonwealth.

25 “Massachusetts corporation”, any corporation or other entity
26 that is subject to chapter 155 or chapter 156B.

27 “Properly served”, that a search warrant or subpoena has been
28 delivered by hand, by United States mail, by commercial delivery
29 service, by facsimile or by any other manner to any officer of the
30 corporation or its general manager in the commonwealth, to any
31 natural person designated by it as agent for the service of process,
32 or if the corporation has designated a corporate agent, to any
33 person named in the latest certificate filed pursuant to section 4 of
34 chapter 181.

35 “Remote computing services” shall be construed in accordance
36 with Title 18, sections 2701 to 2711, inclusive, of the United
37 States Code. This definition shall not apply to corporations that do
38 not provide those services to the general public.

39 “Subpoena”, a grand jury or trial subpoena issued in the course
40 of a criminal proceeding or an administrative subpoena issued
41 pursuant to section 17B.

42 (b) A court or justice authorized to issue warrants in criminal
43 cases may, upon complaint on oath that the complainant believes
44 that any of the records hereinafter named are actually or construc-
45 tively possessed by a foreign corporation that provides electronic
46 communication services or remote computing services, if satisfied
47 that probable cause has been established for such belief, issue a
48 warrant identifying those records to be searched for and com-
49 manding the person seeking such warrant to properly serve the
50 warrant upon the foreign corporation:

51 (1) those records which would reveal the identity of a customer
52 using those services;

53 (2) data stored by or on behalf of a customer;

54 (3) records of a customer’s usage of those services;

55 (4) records of the source of communications sent to or the
56 recipient or destination of communications sent from a customer;
57 or

58 (5) the content of those communications stored by an electronic
59 communication or remote commuting service.

60 (c) The following provisions shall apply to any search warrant
61 issued pursuant to this section and to any subpoena issued in the
62 course of a criminal investigation or proceeding directed to a for-
63 eign corporation that provides electronic communication services
64 or remote computing services:

65 (1) When properly served with a search warrant issued by a
66 Massachusetts court or justice pursuant to this section or a sub-
67 poena, a foreign corporation subject to this section shall provide
68 all records sought pursuant to that warrant or subpoena within 5
69 business days of receipt, including those records maintained or
70 located outside the commonwealth.

71 (2) If an the applicant makes a showing and the court or justice
72 finds that failure to produce records within less than 5 business
73 days would cause an adverse result, a warrant may require produc-
74 tion of records within less than 5 business days;

75 (3) A court or justice may reasonably extend the time required
76 for production of the records upon finding that the foreign corpo-
77 ration has shown good cause for that extension and that an exten-
78 sion of time would not cause an adverse result;

79 (4) A foreign corporation seeking to quash a warrant or sub-
80 poena served on it pursuant to this section must seek relief from
81 the court that issued the warrant or the court, which has jurisdic-
82 tion over the subpoena within the time required for production of
83 records pursuant to this section. The court shall hear and decide
84 that motion no later than 5 court days after the motion is filed;

85 (5) In the case of an administrative subpoena issued by the
86 attorney general, the superior court of Suffolk county shall have
87 jurisdiction; in the case of an administrative subpoena issued by a
88 district attorney, the superior court in any county in which the dis-
89 trict attorney maintains an office shall have jurisdiction; and

90 (6) The foreign corporation shall verify the authenticity of
91 records that it produces by providing an affidavit from the person
92 in custody of those records certifying that they are true and com-
93 plete.

94 (d) A Massachusetts corporation that provides electronic com-
95 munication services or remote computing services, when served
96 with a warrant or subpoena issued by another state to produce
97 records that would reveal the identity of the customers using those
98 services, data stored by, or on behalf of the customer, the cus-
99 tomer's usage of those services, the recipient or destination of
100 communications sent to or from those customers, or the content of
102 those communications, shall produce those records as if that war-
103 rant or subpoena had been issued under Massachusetts law.

104 (e) No cause of action shall lie against any foreign or Massa-
105 chusetts corporation subject to this section, its officers,
106 employees, agents or other specified persons for providing
107 records, information, facilities or assistance in accordance with
108 the terms of a warrant or subpoena issued pursuant to this section.

1 SECTION 3. Section 58½ of chapter 277 of the General Laws,
2 as so appearing, is hereby amended by striking out, in line 7, the
3 word “or”.

1 SECTION 4. Said section 58½ of said chapter 277, as so
2 appearing, is hereby further amended by inserting after the word
3 “violation”, in line 8, the following words:— or where any sort of
4 remote access device used by the defendant was physically
5 located at the time of the violation.